No. 14,657.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EXCHANGE LEMON PRODUCTS COMPANY, a corporation,
Appellant,

vs.

THE HOME INSURANCE COMPANY,
Appellee.

APPELLANT'S REPLY BRIEF.

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Pursuant to Rule 18 of the above entitled Court, Appellant Exchange Lemon Products Company, presents herewith its reply to Appellee's Brief in the above entitled action.

I.

Errors in Appellee's Statement of the Case.

Appellee The Home Insurance Company, hereinafter referred to as "Home Insurance," is in error in two significant matters in its Statement of the Case. (Appellee's Br. p. 3.)

(a) No Stipulation Re "Storage."

Home Insurance states that "it was stipulated in a pre-trial order that . . . at the time of its destruction by flood the property was stored in the warehouse. . . ." (Appellee's Br. pp. 3-4.) Inasmuch as the meaning of the term "transit" and the term "storage," as used in the insurance contract constitute the essence of this case, there was no stipulation that the goods were "stored" or "in storage" at the time of their destruction. The stipulation was merely that the goods were "situate in said warehouse." [Tr. p. 18.]* It is a fundamental contention of Exchange Lemon that the goods so situate at the time of their destruction were "in transit" and not "in storage."

(b) Home Insurance Incorrectly States the Introductory Paragraph of "Issues of Fact to Be Tried" in the Pre-trial Order.

The pre-trial order [Tr. p. 17] is composed of three main divisions. The first is a list of admissions and agreements of fact which would require no further proof on trial. [Tr. pp. 17-19.] The second is with relation to issues of fact and commences as follows:

> "Issues of Fact to Be Tried.
>
> "1. If the Court rules on the issue of law that the defendant is entitled to introduce testimony to the effect that at the time the insurance policy in-

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*All transcript references are to pages in the printed Transcript of Record.

> volved in this action was issued, there was in existence any trade terminology or technical meaning of the transportation trade for the term 'in due course of transit' . . ." [Tr. p. 19.]

Based upon the above language, Home Insurance states that "it was also stipulated in the pre-trial order that *there were no issues of fact for trial unless* '* * * the Court rules on the issue of law. . . .'" (Appellee's Br. p. 4.) However, the terminology of the pre-trial order does not purport to create an exclusive list of all possible issues of fact in the case. It merely lists those issues of fact which are of primary significance and which would follow the Court's decision on the admissibility of evidence of trade usage. Home Insurance would now have the word "if" enlarged to read "there are no issues of fact for trial unless." This was not the stipulation.

Although the issues of fact recited in the pre-trial order are among the issues which would in normal course have been tried in this action, they do not necessarily include all issues of fact which might be involved in the case. Thus, when the District Court made its decision to exclude all evidence by Exchange Lemon and to refuse to impanel a jury, it necessarily made a determination on an issue of fact which neither of the parties had raised, but which issue of fact is the essence of the error here complained of. (See Appellant's Op. Br. p. 7, Pt. 1(b).)

II.

Appellee's Misstatement of the Issues on Appeal.

It is erroneously argued by Home Insurance that "the sole issue tendered by this appeal is a question of law as to whether a Court correctly held that no evidence of trade usage could be introduced. . . ." (Appellee's Br. p. 5.) On the contrary, Exchange Lemon has raised, and enumerated, three distinct issues on appeal.

The first issue on appeal relates to the error of the District Court in refusing to submit any evidence to the jury in an action at law where a demand for jury trial was made and where any decision by the Court was necessarily based upon factual determinations. The second issue on appeal is the one referred to by Home Insurance, to wit: the error of the District Court in refusing to allow the introduction of evidence of trade usage.

A third issue on appeal, and the second issue relating to the introduction of evidence, was that based upon the District Court's erroneous determination that the insurance contract "is unambiguous and is fairly susceptible of but one interpretation." [Tr. p. 72.] This latter issue relates to a determination of law on a question of the ambiguity of a writing viewed on its face and in relation to the pleadings in the case. That finding on the question of law is reviewable anew by this Court without the inhibitions inherent in the review of a factual determination of a trial court.

III.

Reply to Appellee's Argument.

(a) Argument That "There Was No Error in Not Impaneling a Jury."

In support of the above, Home Insurance first makes an argument predicated upon a misconstruction of the scope of the pre-trial stipulation (see *supra*) followed by the conclusion that "parties may, by stipulation, broaden or narrow the issues or change the rules of evidence." (Appellee's Br. p. 6.) *Fed. Deposit Ins. Corp. v. Siraco,* 174 F. 2d 360 (erroneously cited as 174 Fed. 360), is cited to support this proposition. That case involved the question of a stipulation broadening the scope of evidence which might be introduced under a general denial to cover items which otherwise might require special pleading. The Court there denied the broadening of the pleading but in the course of its opinion discussed *Insurance Company v. Harris,* 97 U. S. 331, where a stipulation was given such an effect.

Neither of the foregoing cases offers any authority for the position that the parties may, by stipulation, narrow the issues and restrict the admission of evidence by indirection and implication from the language of their stipulations. As heretofore noted, the pre-trial order does not purport to restrict the issues of fact solely and exclusively to those set forth. It merely states those major issues upon which the parties were able to agree.

The authorities set forth by Home Insurance in support of its premise that the construction of a contract

is a question of law for the Court and not a question of fact for the jury are wholly beside the point. They do nothing more than set forth the general rule, the exception to which is involved in this action. The quotation from Wigmore contained in Appellant's Opening Brief, which is significantly treated with silence in Appellee's Brief, states the full and correct rule on this point:

> "The construction of all written instruments belongs to the Courts. It may become necessary to hear evidence of the surrounding circumstances that fill out the meaning of the words, as well as any local or commercial meanings attached to particular words by usage; *and the ascertainment of this is for the jury.* But, subject to the amplification or the precision of the meaning thus ascertained, it is the duty of the jury to take the construction of the instrument from the Court." (IX Wigmore (3rd Ed.) pp. 522-523, Sec. 2556.) (Emphasis added.)

(b) Argument That "Evidence of Claimed Trade Usage Was Properly Excluded."

It is apparently the contention of Home Insurance that trade usage of the term "transit" cannot be shown because Exchange Lemon has not pleaded a special trade usage for the term "storage" which is the necessary complement to the trade meaning of the term "transit." The argument is without support in the record.

It has been the position of Exchange Lemon from the outset that the term "storage," as used in the transportation trade and when used in connection with and contradistinction to the term "transit," refers to terminal storage and does not include storage in transit. This position is clearly set forth in the language found in the

statement of Exchange Lemon's contentions set forth in the Appendix to Appellant's Opening Brief:

> "It is customary usage in the transportation trade to refer to goods which have been shipped pursuant to such tariff provisions as 'transit' goods. The term 'transit' in this sense describes the goods not only while they are actually travelling on the railroad car but also while they are stopped in transit pursuant to the tariff provisions. In the trade, goods are not generally viewed as in 'storage' until they have reached a final destination or customer." (Appellant's Op. Br., Appx. p. 3.)

This distinction between in transit storage and terminal storage is set forth in the testimony of Tom Borden in Exchange Lemon's offer of proof. [Tr. p. 43.]

Home Insurance, although taking the position that there is no issue of fact to be tried, nonetheless seeks in its brief to find some defect in Exchange Lemon's offer of proof. (Appellee's Br. p. 11.) For some reason, Home Insurance claims to have difficulty in recognizing the testimony relating to the pleaded trade usage of the term "transit." The existence of such terminology trade usage was judicially recognized as long ago as 1921 when the Massachusetts Court in *Koshland v. Columbia Ins. Co.,* 130 N. E. 41, observed in a similar case that,

> "there has grown up in connection with the carriage of animals and merchandise of sundry kinds for long distance over railroads a secondary meaning of the word 'transit.' For the benefit of owners of goods in the course of movement between widely separated localities, the railroads have established what are termed transit privileges, that is, the privilege of unloading goods and applying to them some process for their preparation for ultimate market

and reloading and carriage on to their destination as a single shipment at a through rate with or without a comparatively small additional charge. *In the abbreviation which language sometimes undergoes in the use of the word, 'transit' has acquired the meaning of this privilege of stopping over goods in the course of carriage, being almost the reverse of its primary significance."* (130 N. E. at 43, italics added.)

IV.

Appellee Does Not Contest Appellant's Argument Re Ambiguity.

One of the three major issues raised by this appeal relates to the Court's error in refusing to allow the introduction of evidence to cure the ambiguity of the insurance contract. (Appellee's Op. Br. p. 14.)

Home Insurance studiously avoided meeting this issue of ambiguity, merely reciting the finding of the trial court that the contract was unambiguous. (Appellee's Br. p. 8.) Home Insurance has thus tried to ignore the obvious evidence of ambiguity which is found by comparing the terms of the insuring clause in question with the standard insuring language erroneously set forth by it in its second defense to the Amended Counterclaim. (See discussion at p. 15 of Appellant's Op. Br.) Nor, does Home Insurance raise any question as to the sufficiency of the offer of proof on the issue of ambiguity.

The arguments made by Exchange Lemon on the issues raised by this appeal were numbered consecutively, summarized, and set forth in detailed form. The failure of Home Insurance to meet one of the three major issues raised and argued by Exchange Lemon highlights, by

default, a fundamental error in the ruling of the District Court excluding the introduction of any evidence or the impaneling of a jury.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Appellee The Home Insurance Company has failed to meet and overcome the specifications of error contained in Appellant's Opening Brief. It is submitted that accordingly, this Court should reverse the judgment for the reasons and in the manner set forth in Appellant's Opening Brief.

Dated: June 23, 1955.

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